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**Melissa E. Newman**  
Vice President – Federal Regulatory

Via ECFS

*EX PARTE*

September 4, 2007

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: *In the Matter of Petition of Qwest for Forbearance Pursuant to 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services, WC Docket No. 06-125*

Dear Ms. Dortch:

Attached hereto is an *Ex Parte* Memorandum that Qwest is submitting for inclusion in the record of the above-captioned proceeding. The Memorandum addresses the statutory authority of the FCC to grant the relief that Qwest seeks via its forbearance petition.

This *Ex Parte* and attached Memorandum are being filed pursuant to 47 C.F.R. § 1.1206(b). If you have any questions on the Memorandum, please call Robert McKenna (303-383-6650) or the undersigned using the telephone number reflected in the letterhead.

Sincerely,

/s/ Melissa Newman

cc (via e-mail to):

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**Robert B. McKenna**  
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*Ex Parte*

**M E M O R A N D U M**

**DATE:** September 4, 2007

**RE:** *In the Matter of Petition of Qwest for Forbearance Pursuant to 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services – WC Docket No. 06-125*

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The purpose of this *ex parte* presentation is to briefly explain why the statutory grant of a functionally identical petition for forbearance filed by Verizon<sup>1</sup> precludes the Federal Communications Commission (“Commission” or “FCC”) from taking action on the pending Qwest petition for forbearance<sup>2</sup> that is in any way less favorable than that contained in the Verizon statutory grant.

Qwest’s forbearance petition is in all material respects identical to the Verizon petition. It relies on the same data (updated), and it requests the same relief. The only difference between the two petitions is that Qwest is considerably smaller than is Verizon—and thus presents, if anything, a stronger case for forbearance than did Verizon. As has been repeatedly demonstrated on the record, the Qwest petition meets all of the tests for grant under Section 10(a) of the Communications Act.<sup>3</sup> We do not reiterate that extensive record here.

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<sup>1</sup> *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, News Release, WC Docket No. 04-440 (rel. Mar. 20, 2006), *appeals pending sub nom. Sprint Nextel Corporation v. FCC*, Nos. 06-1111, *et al.* (D.C. Cir. oral argument scheduled for Oct. 15, 2007).

<sup>2</sup> *In the Matter of Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, filed June 13, 2006.

<sup>3</sup> Additional information was submitted by Qwest in WC Docket No. 06-125 on August 31, 2007, in response to a request by the Commission. *See ex parte* letter from Melissa Newman, Qwest to Marlene H. Dortch, FCC, filed Aug. 31, 2007.

However, especially after release of the *ACS Forbearance Order*,<sup>4</sup> it appears that some parties continue to misconstrue the impact of the Verizon statutory grant on Qwest's own petition. The *ACS Forbearance Order* did not address in any detail the argument that ACS was entitled to the same relief granted to Verizon as a matter of law, no doubt because the situation of ACS in Anchorage, Alaska was materially different than the situation of either Verizon or Qwest in the regions where they provide local exchange service. But opponents of the Qwest petition continue to act as if the Verizon grant either did not exist or that it has no binding impact on this proceeding.<sup>5</sup>

The argument that the Verizon statutory grant is not legally binding goes back to the original oppositions to Qwest's and other similar forbearance petitions. Generally opponents claim that, because the Verizon statutory grant did not include an explanation of why the Commission permitted the Verizon forbearance petition to take effect by operation of law, it does not provide a legitimate basis on which to analyze how it is related to other similar or identical petitions.<sup>6</sup> The basic claim is that, in the absence of analysis and factual findings, the Verizon statutory grant has no impact on future applications by identically situated parties. In other words, opposing parties treat the Verizon statutory grant as if it were a legal precedent to be followed or ignored upon application of the legal principles of *stare decisis*.

This argument is far off the mark. The Verizon statutory grant establishes a specific Commission action (even though the actual result was per an action by Congress) with direct legal

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<sup>4</sup> *In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Memorandum Opinion and Order, FCC 07-149 (rel. Aug. 20, 2007) ("*ACS Forbearance Order*").

<sup>5</sup> For the former position, *see ex parte* presentation of COMPTTEL, August 29, 2007, WC Docket Nos. 06-125 and 06-147. For the latter position, *see ex parte* presentation of Sprint, August 31, 2007, WC Docket Nos. 06-125, *et al.*

<sup>6</sup> *See, e.g.*, Opposition of Time Warner Telecom, Inc. at 6, WC Docket Nos. 06-125, *et al.*, Aug. 17, 2006 ("Absent such an explanation, there is no basis for determining whether the instant petitions resemble Verizon's and whether the Verizon decision could somehow support granting the instant petitions."). *See also* Opposition of COMPTTEL at 6, WC Docket No. 06-125, Aug. 17, 2006 ("In the absence of any indication as to the factual basis for the forbearance deemed granted, there is no foundation for the BOCs' presumptions."); Opposition of Broadview Networks, *et al.* at 10, WC Docket Nos. 06-125, *et al.*, Aug. 17, 2006 ("Central to the application of precedent is the actual existence of the precedent itself, which only can follow *action* by a court or agency.") (emphasis in original).

consequences. The Commission, in determining how to act on other identical petitions for forbearance following the Verizon statutory grant, is not given a license to behave arbitrarily and capriciously and in derogation of its mandate to treat identically situated parties identically. At the very least, the Commission would need to explain in detail any different or less favorable treatment of the Qwest petition—and the fact that the Commission chose to allow the Verizon petition to take effect by operation of law is not a valid basis on which to justify differential treatment of the Qwest petition. In other words, the Commission’s decision to allow the Verizon petition to be granted by operation of law establishes a specific decision by the Commission that must be harmonized with any future decision involving identically situated parties. The fact that the decision has no explanation (and in that sense does not form the basis for valid precedent beyond the narrow scope of identical petitions for forbearance) is not relevant to the fact that the Commission still must treat identical parties identically. A decision by the Commission to allow one forbearance petition to take effect by operation of law, and to deny an identical petition filed by a different party, would be arbitrary and capricious and thereby unlawful.

Qwest pointed out this basic premise in its initial petition and in its reply comments.<sup>7</sup> The FCC is not at liberty to discriminate among similarly situated parties, far less identically situated parties, at least without a well-documented and reasoned rationale.<sup>8</sup> This premise is well established, and does not seem to be challenged by those opposing grant of Qwest’s petition. Where these opponents err is in treating such a discrimination among similarly situated applicants as a matter of following precedent, rather than as a matter of avoiding arbitrary and capricious decision-making. It would be arbitrary and capricious for the Commission to decline to grant Qwest forbearance relief that is in any way less than that granted to Verizon because of the Commission’s obligation to treat identically situated parties in the same manner.

The requirement that the Commission not discriminate between similarly situated (not to say identically situated) parties is broad and critical. For example, in the area of waiver of the Commission’s rules, where the Commission’s discretion is at its zenith, the one basis for judicial reversal of a refusal to grant a rule waiver is that the Commission inexplicably treated similarly situated waiver applicants differently.<sup>9</sup> This is true even in such ministerial situations as determining whether or not to accept a late filed application or pleading.<sup>10</sup> And differing

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<sup>7</sup> Qwest Petition for Forbearance at 7-10, *supra*; Qwest Reply Comments at 8-12, WC Docket No. 06-125, Aug. 31, 2006.

<sup>8</sup> See *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965).

<sup>9</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

<sup>10</sup> See *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 238 (D.C. Cir. 1985); *NLRB v. The Washington Star Company*, 732 F.2d 974, 976-77 (D.C. Cir. 1984).

procedural postures between applicants before an agency (which would characterize any difference between Qwest and Verizon here) do not by themselves justify different treatment.<sup>11</sup> As the Court of Appeals for the D.C. Circuit stated in reversing the NLRB's refusal to waive a filing deadline under circumstances where the deadline had been waived for other litigants in other cases: "The present sometimes-yes, sometimes-no, sometimes-maybe policy of due dates cannot, however, be squared with our obligation to preclude arbitrary and capricious management of the Board's mandate."<sup>12</sup>

And this is precisely the point. Verizon has been granted forbearance under Section 10 of the Act. This forbearance came about as a matter of Congressional action, but this action was triggered by the FCC's decision not to act on the Verizon petition within the statutory time line. Should the FCC determine to act on the Qwest petition (rather than according it exactly the same treatment given to Verizon), the Commission must affirmatively grant to Qwest no less than the identical relief granted to Verizon by operation of law. To act otherwise would be arbitrary, capricious and contrary to law.

Because the Qwest petition meets the statutory criteria for grant on its merits irrespective of the Verizon grant, this critical legal issue should be moot. But the Commission is not at liberty to pretend that the Verizon grant did not happen. The Qwest forbearance petition is in all material respects identical to the Verizon petition. The procedural fact that the Commission might choose to act affirmatively on the Qwest petition as opposed to allowing it to take effect as a matter of law is not a valid reason for discriminating between the Qwest petition and the Verizon one. As a matter of law Qwest is entitled to the same relief as was granted to Verizon.

Sincerely,

/s/ Robert B. McKenna

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<sup>11</sup> See *Ace Motor Freight, Inc. v. ICC*, 557 F.2d 859, 863 (D.C. Cir. 1977); *Independent Petroleum Association of America v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996); *Burlington Northern and Santa Fe Railway Company v. Surface Transportation Board*, 403 F.3d 771, 776-77 (D.C. Cir. 2005).

<sup>12</sup> *NLRB v. The Washington Star Company*, *supra*, 732 F.2d at 977 (reference omitted).